

NO. 9467

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**United States Circuit Court  
of Appeals**

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**Ninth Circuit**

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W. W. PERCIVAL, Guardian of  
the Persons and Estates of John  
Percival Luce and Dorothy Hume  
Luce, Minors,

Appellant.

vs.

HAROLD LUCE,

Appellee.

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**Petition for Rehearing, and Supporting  
Brief**

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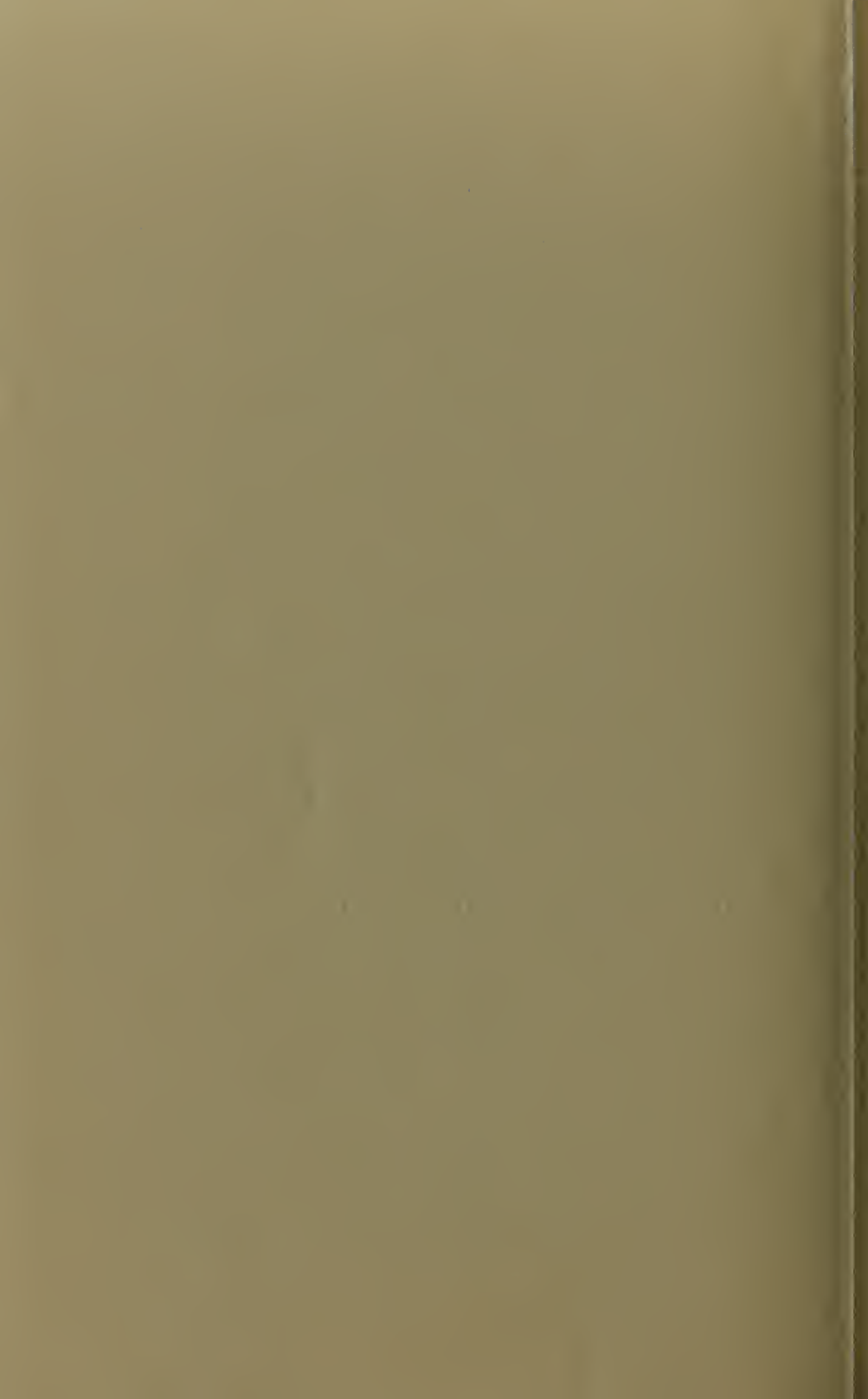
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### Petition for Rehearing, and Supporting Brief

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Comes now W. W. Percival, Guardian of the persons and estates of John Percival Luce and Dorothy Hume Luce, minors, appellant in the above entitled cause and respectfully petitions this Court to grant a rehearing upon the following grounds, towit:

1. The Court has misconstrued the agreement, Exhibit A, and has wholly disregarded the intention of the parties thereto, to provide a direct benefit for the children named therein, viz: support and maintenance.
2. The Court has erroneously concluded that a contract providing expressly for the payment of

money for the support of the promisee's and promisor's children is one merely for their incidental benefit.

3. The Court has wholly disregarded a sound public policy which requires a father to support and maintain his minor children.

4. The Court has misapplied or misconceived the law which gives third party beneficiaries a cause of action on a contract for their direct benefit.

5. The Court has ignored the rule recently announced by it to the effect that,

“ . . . A motion for judgment on the pleadings is not favored by the courts, and this is true if the motion is permitted to cut off the right to amend, thus preventing a hearing on the merits. But if the motion for judgment is treated as a demurrer to the defective pleading with leave to amend in a proper case as was done here, the practice is sanctioned by usage and free from objection,”

because it has, by affirming the judgment of the trial court, denied a trial on the merits.

6. The Court has erroneously denied two minor children the right of support from their natural father.

7. The Court erroneously construed the pleadings when it decided that the plaintiff had failed to plead a breach of contract, for the reason that it is expressly alleged in the complaint that the defendant had failed to make payment to the plaintiff *or to any other person* for the use and benefit of the said minor children, and the mother,

Dorothy Luce would be "any other person" within the meaning of the pleading.

8. The Court has construed the pleadings strictly instead of liberally as required by law and has denied to appellant the right to amend the complaint to present equitable issues.

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Attorneys for Appellant.

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### SUPPORTING BRIEF

The Court affirmed the judgment of the trial court, giving two reasons:

1. That the minor children were mere "incidental beneficiaries" of the contract between Harold Luce and Dorothy Lehman (formerly Dorothy Luce) and therefore could not maintain this action.
2. The complaint does not allege a breach of contract by the defendant.

Neither point was argued by appellee. In fact it was tacitly admitted by the appellee that the complaint stated a cause of action (Appellee's Brief, page 5). He contended in the trial court and it was his contention here that the complaint did not state a claim upon which relief could be granted in view of certain defenses in appellee's answer. The points upon which the case was decided have not, therefore, been adequately argued.

It is said in the Court's opinion that this is a case of incidental benefit to the minors because:

"The promise was made to Dorothy Lehman. The money was to be paid to Dorothy Lehman. Thus

Dorothy Lehman was not only the promisee, but was also the payee, and the only payee, mentioned in the contract."

No other reason is suggested for holding that the children were only incidentally benefited. Contracts must be construed in the light of surrounding circumstances. John Percival Luce was three years of age at the time the contract was made and Dorothy Hume Luce was one and one-half years of age. It is submitted that it would have been absurd for the parties to provide for payment directly to children of such tender years. The natural and ordinary course is to provide for payment to the mother for support and maintenance of the children. This was done. What did the parties intend? What was the purpose of the contract? These are the things to be considered, not the technical language used. The rule is stated thus in *Corpus Juris Secundum*.

"That the parties must have clearly intended the contract to be for the benefit of the third person to enable him to sue thereon is one of the most commonly expressed limitations of the rule, . . . It follows therefrom that an incidental beneficiary, one who will only be incidentally benefitted by performance of the contract cannot maintain an action thereon. The *intent to benefit the third person* must clearly appear from the language of the agreement in light of circumstances under which it was entered into." (17 C. J. S., pg. 1129. 1130).

Here the intent to benefit the children appears on the face of the agreement. The children were *named as beneficiaries*, and the amount to be paid to each was definitely stated. One of the principal reasons for making the agreement was to provide support for the children. This is the first time to our knowledge a court has asserted that



support and maintenance of minor children of very tender years is a *mere incident* to a separation agreement.

The question of a contract for support was discussed by Mr. Williston as follows:

“Still another hybrid case is that where a child brings action on the covenant or promise of his putative father to provide for his support and education. So far as the promise is made to the mother, the promisor thereby undertakes to perform a duty owing by her to the child, and the latter becomes a creditor beneficiary, but since in most States the father is under a statutory duty to provide such support, some jurisdictions professing not to recognize the creditor beneficiary type or not to apply the third party beneficiary doctrine to sealed contracts treat this case as *sui juris* and allow the child to sue on the ground of public policy. *Everywhere, however, the child is permitted to maintain the action, and usually as a third party beneficiary.* The determination of who is a beneficiary and whether he falls within the protected classes, and if so, in which of these, must depend upon the particular circumstances of each case.” (Williston on Contracts (Revised Ed.), Vol. 2, pg. 1044).

Many well considered cases are cited in support of the text.

Brill v. Brill, 282 Pa. 276; 127 A. 840.

Greene County v. Southern Surety Co., 292 Pa. 304, 312; 141 A. 27.

Book's Estate, 297 Pa. 543; 147 A. 608.

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Gardner v. Denison, 217 Mass. 492; 105 N. E. 359.  
 Weinberger v. Van Hessen, 260 N. Y. 294; 183  
 N. E. 429.

See also note:

39 A. L. R. at page 448.

The case of Brill v. Brill, *supra*, involved a question very similar to the one under discussion here, the only difference being that in the Brill case the child was illegitimate. This difference is immaterial. J. Edward Brill, the father of the child, made a contract with the mother, Mary A. Seabrooke by the terms of which he was to *pay to Mary A. Seabrooke* \$150 per month for five years, "of which \$110 is stated to be for the benefit of the obligee, and \$40 to the obligee as guardian of the person of her son Edward . . . ." The Court held that the son Edward could sue for the money by his next friend. The Court said:

"We thus revert to the only test which is believed to be decisive in the present case, and that is whether the promise to pay a specific part of the money under the bond to the plaintiff is primarily for the latter's benefit, or for that of the obligee, Mary A. Seabrooke. There would not seem to be much difficulty in answering this question. The bond specifically segregates a certain sum for the plaintiff. The wording as to the manner in which this money is to be paid is somewhat unusual inasmuch as it provides for payment 'to the obligee as guardian of the person of her son, Edward, through the guardian of the estate of the said Edward,' but this provision would seem to indicate that the money is to go to Edward's estate and thus become his sole and separate property and then is to be turned over by the estate to the mother as personal guardian of Edward in order

that she can devote the money for his maintenance and support. So definite and distinct is the setting apart of the funds to be paid to Edward that it is provided in the bond that in case of marriage of the mother or in case of the death of the defendant prior to the death of the mother, the primary and main benefit is for Edward, the third put into a trust for his use and benefit. Indeed the whole tenor of the bond is in effect to provide a separate trust fund for his maintenance and support. Certainly this money is entirely and exclusively for his use and benefit. It is true, of course, that to a certain extent this provision for Edward is for the benefit also of his mother. But, as already pointed out, in all of these cases the provision to pay to a third person is no doubt partly, or at least secondarily, for the benefit of the other contracting party. The point is that the primary and main benefit is for Edward, the third party involved. He has a definite, vital interest in the fund created and in the income therefrom, and it would certainly seem that he thereby comes well within the requirement laid down in *Klinger v. Wick*, supra, namely, that the contract should create in him a 'legal or equitable interest' . . . We are thus led to the conclusion that the plaintiff, Edward, has a distinct interest under the contract which brings him within the principle entitling him to enforce his rights thereunder, although not named as a party to the contract." (*Brill v. Brill*, 282 Pa. 281, 283).

A New York case,

*Todd v. Weber*, 95 N. Y. 181,

involved a similar question and contains a well reasoned discussion of the law, tracing the history back to the early leading English case of

*Dutton v. Poole*, 2 Levinz 210.

It is said:

“If I am right in these conclusions there is before us a valid contract made between the testator and the several persons named for the benefit of the plaintiff. The only remaining question is one of parties — who should bring this action for its enforcement. As she had the sole beneficial interest in the contract, it was, we think properly brought in her name. This would seem plain enough upon principle, but it is also well established by authority.”

Upon examination of the cases cited in the opinion of the Court in the instant case, we find none involving a contract between parents for the support of a child. We submit that no case can be found which holds as the Court has in this case that such a contract is not for the direct benefit of the child. Where minor children are involved courts have from the standpoint of public policy uniformly required a parent to provide for their support and maintenance. This opinion if it is allowed to stand, ignores public policy. Children in necessitous circumstances are deprived of their day in court by a construction of a contract which is contrary to the intent of the parties, and to all precedent. Because a father agreed to pay money to the mother for the support of minor children, one three years of age and the other one and one-half years of age, instead of to the children themselves, it is concluded that the children were only *incidentally benefited* and they are denied relief. For a discussion of incidental beneficiary cases see

Williston on Contracts, (Rev. Ed.), Vol. 2, p. 1157.

Mr. Williston says that the typical case is where A promises B to pay him money for his expenses. Creditors of B are not generally allowed to sue A. Contrast such a case with this one where A, a father promises to pay B, a mother a certain sum for the *support and maintenance*

of their children. Who is the direct beneficiary of the agreement to pay \$25 per month if it is not the children?

The complaint states a cause of action for the reason that it is alleged that the defendant is the father of the children. Children have a cause of action for support regardless of an express contract.

46 C. J. 1256, et seq.

It is held by this Court that the pleading of the breach of contract is not sufficient, because it is not specifically alleged that the defendant has not paid the money to Dorothy Lehman. It is however alleged that the money was not paid to the plaintiff or to any other person for the use and benefit of the plaintiff. The possibility that payment was made to Dorothy Lehman is negated by the clause to the effect that it was not made to any other person. It is admitted in the answer that no payment was made by defendant after November 1, 1926. If the allegation is not sufficient the plaintiff should be given an opportunity to amend.

It is respectfully submitted that a rehearing should be granted and the judgment of the trial court reversed

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